SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 245

MILTON BERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Preliminary Statement

On October 21, 1963 this Court granted the Petitioner's Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and placed this case on the summary calendar of the Court. The Petition prays that this Court review two orders of the United States Court of Appeals for the Second Circuit, entered May 29, 1963 and June 26, 1963, dismissing successive appeals brought by the Petitioner respectively from a sentence and judgment of conviction entered April 24, 1963, and from an amended sentence and judgment entered June 10, 1963. Neither of said orders of the Court of Appeals were accompanied by any opinion.

Opinion Below

On the eve of trial in the United States District Court, Southern District of New York, petitioner had made a motion to suppress evidence claimed to have been unlawfully seized by federal agents, in contravention of Petitioner's rights under the Fourth Amendment (Fols. 651-659) * †. The motion was renewed during the course of the trial and again after trial (R., pp. 1, 48, 53-55; Fols. 9, 463, 597-600) *. The memorandum opinion of the trial Court, denying said motion, is included in the printed record (R., pp. 56-57). Said opinion has not yet been reported.

Grounds for Invoking Jurisdiction of this Court

The jurisdiction of this Court is invoked under Title 28 United States Code § 1254(1) and under Rule 19 of the Rules of this Court, on the ground that this Court has the power and authority to review the said orders of the Court of Appeals, respectively made and entered May 29, 1963 and June 26, 1963. The within Petition for Certiorari was duly filed on June 28, 1963. Said jurisdiction is invoked under the general power and authority of this Court in its supervisory capacity over the actions of federal Courts in their application of the Federal Rules of Criminal Procedure, particularly Rules 37(a)(2) and 45(a).

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* References preceded by the prefix "R." refer to pages of the printed record.

References preceded by the prefix "Fol." refer to folio pages of the original record filed in this Court.

†Omitted from printed record.

Constitutional Provisions, Statutes and Rules Involved

(Set Forth in Entirety in Appendix Hereto)

Constitution

1. Amendment IV, United States Constitution.

2. Amendment V, United States Constitution.

United States Statutes

3. Criminal Appeals Rules Act, February 24, 1933, c. 119, 47 Stat. 904, sec. 2, as Amended.

Federal Rules of Criminal Procedure, Title 18, United States Code

4. Rule 37(a)(2).

5. Rule 45(a).

6. Rule 56.

New York State Statutes:

McKinney's Consolidated Laws of New York

7. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 206-a.

8. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 902.

9. McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Sec. 282.

10. McKinney's Consolidated Laws of New York, Book 46, Public Officers' Law, Sec. 62.

Questions Presented for Review

(1) Whether it was improper for the Court of Appeals to dismiss an appeal filed on a Monday morning, the twelfth day following Wednesday afternoon sentencing and entry of judgment, where the Clerk's office was open only in the morning of the tenth day, which was a Saturday, and where by reason thereof the appellant did not have the benefit of ten full days following the sentencing and entry of judgment for deliberation and consideration of the proposed appeal.

(2) Whether it was improper for the Court of Appeals to dismiss an appeal from the conviction filed within ten days following a resentencing and amended judgment upon the original conviction.

(3) Whether petitioner was deprived of due process of law by either the dismissal of the first appeal or by the dismissal of the second appeal in that said dismissals de-dismissal of the second appeal in that said dismissals deprived the petitioner of any opportunity for appellate review of serious constitutional matters involved in proceedings in the trial court—to wit: the question of whether petitioner's motions in the trial court for suppression of evidence obtained by government agents sans warrant and without petitioner's free and knowledgeable consent, and for suppression of a statement found to have been given involuntarily by the petitioner, were improperly denied by the trial court. With this arises the subsidiary question whether, in light of the doctrine of *Chessman* v. *Teets*, 354 U. S. 156, that Constitutional rights are to be protected by this Court no matter how late they may be asserted,—are Constitutional rights of the petitioner to be foreclosed by reason of the filing of the first Notice of Appeal one business day after the last day for filing fixed by Rule 37 of Federal Rules of Criminal Procedure adopted by this Court.

Statement of the Case

Petitioner was convicted upon trial by Court and jury, in the United States District Court, Southern District of New York for unlawful possession of counterfeit $10.00 Federal Reserve Notes, (18 U. S. C. § 472) and unlawful possession of securities in excess of $5,000.00 in interstate commerce (18 U. S. C. § 2315) respectively charged in Counts 1 and 2 of a 3-count Indictment (R. pp. 58-61).

Upon his conviction of said offenses, Petitioner was sentenced by the trial Court, and the Court made its judgment and commitment, on April 24, 1963, at 2:15 P. M. (R., pp. 58-59; Fols. 603a, 604; Orig. Record, p. 597). Petitioner decided to appeal, and executed his notice of appeal on Thursday, May 2, 1963 (R., p. 66, Fol. 615). By reason of illness of the attorney assigned to file said notice on Friday, May 3, 1963, the said Notice of Appeal was not filed until the following Monday, May 6, 1963 (R., pp. 62, 66-67; fols. 608, 615-616). The United States Attorney moved to dismiss the appeal on the ground that it was not timely filed in accordance with Rule 37(a)(2) of the Federal Rules of Criminal Procedure (R., pp. 63-65; Fols. 611-614). The said motion to dismiss was granted, and the Court of Appeals for the Second Circuit entered an order dismissing the appeal (R., pp. 65, 68; Fols. 614, 618).

Petitioner then moved in the District Court for reduction of his sentence pursuant to Rule 35 of the Rules of Criminal Procedure (R., pp. 69-71; Fols. 621-624). Petitioner's motion was heard before the Trial Judge (R., pp. 70, 81-85; Fols. 622, 636, 637-647). In the oral hearing of the motion, the trial Court noted that Petitioner intended to prosecute an appeal if the sentence was changed and an amended judgment were entered (R., pp. 83, 84, 85; Fols. 640-641, 645-647). In granting the motion and in amending the sentence and judgment, the trial Court took into account the statements of defendant's attorney that

the defendant would appeal from the amended sentence and judgment (*Ibid.*). The Court made and entered an amended judgment and commitment on June 10, 1963 (R., pp. 85-86, Fol. 648).

On June 11, 1963, Petitioner filed a Notice of Appeal from the said amended judgment and sentence (R., pp. 87-88; Fols. 649-650). The Government then moved to dismiss the appeal for want of jurisdiction (R., pp. 89-91; Fols. 652-654). The Government's motion to dismiss the appeal was granted by the Court of Appeals, which entered an Order dismissing the appeal on June 26, 1963 (R., pp. 92-93; Fols. 656-657).

Petitioner then filed his Petition for a Writ of Certiorari on June 28, 1963, which was granted by this Court on October 21, 1963 (R., p. 93; Fol. 660).

Summary of Argument

The administration of the Rules of Criminal Procedure should be governed by considerations of simplicity in procedure and fairness in administration (Rule 2). Where one interpretation of the application of Rule 45(a), governing the computation of time, can result in avoiding a forfeiture and preclusion of the defendant's right of appeal, such interpretation should be favored. The original sentencing and judgment herein occurred in the afternoon of April 24, 1963 (Original record, p. 597 (first page of minutes of sentencing); Fol. p 603a). The tenth day following was a Saturday. It is conceded that the District Court Clerk's office, where the Notice of Appeal herein was to have been filed, was open on Saturday morning up to 12:00 noon. Inasmuch as the office was not open on Saturday afternoon, the Petitioner did not have ten full days available to him in which he could file his appeal.

In considering this matter, this Court should give due consideration to the fact that applicable New York laws

provided that all Courts and all public offices were to be closed on Saturdays. The word "holiday" as set forth in Rule 45(a) is nowhere defined in the Rules of Criminal Procedure, nor in the United States Code Titles regarding Judiciary and Judicial Procedure (Title 28) or Crimes and Criminal Procedure (Title 18). In absence of such definition, the operative status of Saturday in New York, as provided under such statutes, should be deemed the equivalent of a holiday in New York. Accordingly, the effect of such State statutes, when read into the word "holiday" in Rule 45(a), should be given effect to extend the Petitioner's time to file a Notice of Appeal from a tenth day falling on a Saturday until the following business day (a Monday in this case).

Petitioner contends that the second appeal, having been taken on June 11, 1963 from the Amended Judgment entered June 10th, was a proper appeal, and one which permitted the Court of Appeals to review the merits of the original conviction. The amended judgment was intended to stand in place of the original judgment, and it was founded upon the defendant's conviction upon his trial before Court and jury (R., pp. 85-86; Fol. 648). It is submitted that said sentence and judgment, having been against the defendant, was sufficient to give rise to defendant's right of appeal therefrom.

As indicated in the third Question presented for review herein, Petitioner seeks to protect his right to appeal to redress errors of Constitutional degree that, Petitioner contends, occurred at the trial. Petitioner contends that notwithstanding any foreclosure of any of Petitioner's rights by reason of the aforesaid Rules of Criminal Procedure, that Petitioner should still be entitled to prosecute his appeal with respect to any errors of the trial Court which were of such gravity as to abridge Petitioner's Constitutional rights. Petitioner submits that the denial of his motion to suppress evidence which federal agents

searched for and seized without warrant, and without Petitioner's consent, was an infringement of his rights, as was the admission of such evidence upon the trial.

Likewise, Petitioner claims that his Constitutional rights under the Fourth and Fifth Amendments were infringed by the admission into evidence of a statement which was elicited as the immediate and direct result of the federal agents' said alleged illegal search for and seizure of contraband. This statement was prepared by the agents while they questioned the Petitioner at their headquarters. Since the evidence of the government agents clearly indicates that Petitioner did not intend to adopt the statement as his own prior to consulting an attorney (R., pp. 9-13, 34; Fols., pp. 34-37, 38-41, 140-141), it is further submitted that such statement should have been excluded as an involuntary confession violating petitioner's Constitutional rights under the Fifth Amendment. Otherwise, the fact that a defendant expresses a desire not to sign a statement and that he declines to take a positive step by which the statement could be attributed to him, would be of little avail.

The jurisdiction of Federal appellate courts to consider the merits of Constitutional questions involved in an appeal should prevail over objections based upon the combination of various rules of Criminal Procedure in instances where their application and construction are not patently clear and certain.

POINT I

In absence of a clear direction in Rules 37 and 45 of the Rules of Criminal Procedure requiring dismissal of the first appeal, such rules should have been interpreted to uphold the efficacy of a notice of appeal filed the first business day following a Saturday deadline.

Under Rule 37 of the Rules of Criminal Procedure, the ten-day period for Petitioner to file his Notice of Appeal commenced Thursday, April 25, 1963. Petitioner had been sentenced in open court on Wednesday afternoon, April 24, 1963 at 2:15 P. M. (R., pp. 58-59; Fols. 603a-606; Orig. record, p. 597); the tenth day thereafter was Saturday, May 4, 1963. Petitioner concedes that the office of the Clerk of the District Court, Southern District of New York was open on Saturdays, including May 4th, from 9:00 A. M. to 12:00 noon. The Notice of Appeal was filed on the following Monday morning, May 6, 1963. Upon the Government's motion, the Court of Appeals for the Second Circuit dismissed the appeal for want of jurisdiction (R., p. 68).

Petitioner contends that Rule 45(a) of the Rules of Criminal Procedure, defining the rules for computation of time, does not require that such last Saturday be considered as an effective deadline date. The operative provision of said Rule reads:

> "The last day of the period so computed is to be included, unless it is a Saturday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday."

Nothing contained in Rule 45(a) specifies or refers to any definition of a legal holiday, nor is there any provision of Title 18 (Crimes and Criminal Procedure) or Title 28 (Judiciary and Judicial Procedure) nor of any other appli-

cable federal statute defining what days can be considered as "legal holidays" or their equivalent within the context of Rule 45.

Some provisions of federal statutes define the meaning of the term "holiday" with respect to particular titles and chapters. Section 1(18) of Title 11, U. S. C. defines "holiday" with reference to the Bankruptcy Act. Section 7503 of Title 26, U. S. C. gives fairly precise definitions of "legal holiday" for purposes of the Internal Revenue Code. Title 5 U. S. C. §§ 86a, 87, 87a and 87c provide specifications of holiday with respect to the working hours of federal employees, and provide for methods to determine the holidays for which federal employees are to be excused from work. Executive Order No. 10358, promulgated June 9, 1952, 17 F. R. 1529, implements and clarifies the mechanics of the aforesaid sections of Title 5.

A note No. 4 to Rule 56, of the Rules of Criminal Procedure, which note was drafted by the Advisory Committee on Rules, appointed by this Court, indicates that "The term 'legal holiday' includes Federal holidays as well as holidays prescribed by the laws of the State where the Clerk's office is located". No authority is quoted for this. However, in the light of the history of the federal system, and of federal-state cooperation and co-ordination, it would appear appropriate to refer to New York State statutes to obtain a full definition of what constitutes the equivalent of a Sunday or holiday in the State of New York. The Court should take note of the fact that the attorney for the defendant and his office staff practice in the State of New York and have been accustomed to the operation of New York State laws and rules (R., pp. 66-67, 83; Fols. 615-616, 640).

New York statutes provide that offices of clerks of courts located in New York City, as well as all County offices, and all state offices, are closed on Saturdays, and that whenever time for filing any paper or for doing any act expires

on a Saturday, such time is deemed to be extended to and including the following business day. McKinney's Consolidated Laws of New York: Book 11, County Law, §§ 206-a, 902; Book 29, Judiciary Law, § 282; Book 46, Public Officers Law, § 62. (All set forth in the Appendix hereto.)

This Court should recognize that attorneys practicing in Federal Courts tend to assimilate the forms and practices in the State Courts where the Federal districts are located, to the extent that the same do not conflict with Federal practice statutes and rules. The forms and modes of State practice follow their practitioners in their cases in the United States Courts. This Court should recognize the policy voiced by the New York State Legislature, in the aforesaid Statutes (set forth in the Appendix hereto) that generally keep the Courts and public offices of the State and City of New York closed on Saturdays as the equivalent of a "legal holiday" that is specified but not defined in Rule 45.

In the absence of any federal pre-emption of any definition of what is a holiday or half-holiday and what is a business day, it is proper (even though unnecessary) for Federal Courts to look to State law and regulations. *Cf.*, *Prudential Oil & Mineral Co.* v. *Hamlin*, 261 F. 2d 626 (10th Cir. 1959).

In *United States* v. *Foster*, 83 F. Supp. 197 (D. C. S. D. N. Y. 1949), the District Court for the Southern District of New York held that it was proper for the federal district court of the Southern District of New York to refer to the practice followed in New York pursuant to Section 596 of the Judiciary Law for selecting grand and petit jurors. This practice was approved by the Court of Appeals for the Second Circuit in a case that was affirmed by this Court. *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), *affirmed*, 341 U. S. 494; *rehearing denied*, 342 U. S. 842, 355 U. S. 936.

By enacting several statutes closing public offices in the State of New York and in the City of New York on Saturdays, the legislature of the State of New York has declared its policy. That such general custom of Saturday work cessation by petitioner's attorneys was involved in the instant case as well as in *United States* v. *Isabella*, 251 F. 2d 223 (2d Cir. 1958), where contentions as to deprivation of the defendant-appellant's rights based upon religious observances of the defendant's attorneys were rejected, should not preclude this Court from reviewing this matter independently, in the light of all circumstances bearing upon the substantial interests of the petitioner which are at stake herein. Petitioner, by being sentenced on a Wednesday afternoon, did not have the benefit of ten full days to deliberate as to his appeal.

Petitioner is not unmindful of the Second Circuit Court's ruling in the *Isabella* case, *supra*, 251 F. 2d 223 (2d Cir. 1958), cited in *United States* v. *Robinson*, 361 U. S. 220, 224 (1960), which held contrariwise to petitioner's position herein. It is submitted that in the *Isabella* case the Court of Appeals for the Second Circuit erred in not giving close consideration to the matters urged herein, particularly the lack of clarity or precision in Rules 37 and 45 of the Federal Rules of Criminal Procedure as to the need for dismissal of an appeal filed on the Monday following a Saturday expiration of the ten-day period for filing an appeal from a judgment made the Wednesday of the preceding week.

To the extent that the *Isabella* case, *supra*, may be considered determinative, it is submitted that that decision, which appears to have been blindly followed by the Second Circuit Court in the instant case, was erroneous, and that this Court should exercise its power of supervision over said Circuit Court to overrule that decision.

Petitioner contends that the Federal Rules of Criminal Procedure must "be construed to secure simplicity in procedure, fairness in administration and the elimination

of unjustifiable expense and delay" (Rule 2). It is submitted that as a corollary, the right of appeal may not be foreclosed except by the definite and unequivocal application of simple and precise rules that clearly specify the times and circumstances when the right of appeal can be cut off. *Boykin* v. *Huff*, 121 F. 2d 865 (App. D. C. 1941). Petitioner submits that any doubts as to the application of the Federal Rules of Criminal Procedure to cut off, foreclosure or limit in any way a defendant's right of appeal are to be resolved in favor of his rights of substantive and procedural due process of law as are guaranteed by the Fifth Amendment to the United States Constitution.

POINT II

The efficacy of the notice of appeal filed Monday, May 6, 1963 is supported by the lack of a period of ten full days up to the noontime closing of the Clerk's office on Saturday, May 4, 1963.

The right of appeal in a criminal case has substantial significance in the federal judicial system and juridical structure, so as to be worthy of protection against undue abridgement. Petitioner contends that when this Court promulgated Rule 37 of the Rules of Criminal Procedure, pursuant to the power granted to it by Congress (Criminal Appeals Rules Act, February 24, 1933, c. 119, 47 Stat. 904, as amended), it intended to give a defendant the benefit of ten full days after the date of imposition of sentence during which a defendant could effect the filing of a notice of appeal. Thus, the dismissal of his appeal filed May 6, 1963 deprived petitioner of the benefit of such period.

Petitioner contends that Rule 37 should be interpreted so as to give him ten full days following the imposition of sentence to permit him and his attorneys to deliberate as to the advisability of filing an appeal as well as to permit

the physical preparation and filing of the appeal. Inasmuch as the tenth day, May 4, 1963, was a Saturday, on which day the Clerk's office was open only until 12:00 noon, to consider such a day to be a full day for purposes of Rule 37 would abridge the opportunity that said Rule would otherwise afford to petitioner.

The ten-day period provided by Rule 37 excludes the day on which the sentence was imposed. In the within case, the court session at which petitioner was sentenced commenced at 2:15 P. M. (Original record, p. 597; Omitted from printed record; Fol. 603a). In this case, petitioner did not have the benefit of even ten full days subsequent to the pronouncement of sentence and entry of judgment, since noon on Saturday, May 4, 1963 was a fraction of a day less than ten days after the sentencing in the afternoon of April 24, 1963. Under Rule 37, a defendant is entitled to more than this—namely, ten full days subsequent to the date that the sentence is pronounced. Petitioner had only nine days and a fraction of the eight business hours of a normal work day (from 9:00 o'clock to 12:00 noon on Saturday, May 4, 1963).

It is conceded that usually, fractions of a day are not significant. However, where the ends of justice required taking such fractions into account, this Court has been willing to do so. In *Louisville* v. *Savings Bank*, 104 U. S. 469, 474-475 (1881) this Court declared that "it is true that for many purposes the law knows no division of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily into the fractions of any other unit of time. * * * The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month, which restrains us from regarding its constituent days. The

law is not made of such unreasonable and arbitrary rules." (104 U. S. at pp. 474-475).

Accordingly, this Court should find that by reason of the abridgment of the said ten-day period due to the noontime closing of the Clerk's office on Saturday, the time for filing extended to the next business day, May 6, 1963. Rules respecting the computation of time for filing a notice of appeal from a criminal conviction should not be computed mechanically with a view to cutting off a defendant's right of appeal on narrow technical grounds, but instead should be interpreted reasonably with a view to preserving such rights if there is any reasonable basis for so doing.

POINT III

The Court of Appeals should not have dismissed petitioner's prompt appeal from the reduced sentence and amended judgment and commitment entered June 10, 1963.

After dismissal of his appeal filed May 6, 1963, petitioner moved for reduction of his sentence and for other relief (R., pp. 69-80). At the hearing of the motion on June 10, 1963, petitioner's attorney stated that petitioner intended to prosecute an appeal from such amended judgment as might be entered were the Court to grant the motion (R., pp. 83-85; Fols. 640-641, 645-647). The trial court granted the motion, and entered an Amended Judgment and Commitment (R., pp. 84-86; Fols. 647, 648). Petitioner filed a notice of appeal therefrom, on June 11, 1963 (R., pp. 87-88; Fol. 649). Said appeal was dismissed by the Court of Appeals upon the Government's motion to dismiss for want of jurisdiction (R., pp. 89-93).

It is submitted that the Amended Judgment and Commitment entered by the District Court on June 10, 1963 (R., pp. 84-86; Fol. 648) was such a judgment as to confer upon petitioner the right of appeal therefrom.

The opportunity for a defendant to appeal from an amended or corrected judgment is indicated in *Berman* v. *United States*, 302 U. S. 211 (1957).

In *Bridges* v. *United States*, 259 F. 2d 611, 614 (9th Cir. 1958) the Court of Appeals held that the appellant in an appeal from a District Court order denying collateral relief from a sentence in a proceeding under Title 28 U. S. C. § 2255, was prejudiced by his failure to take an appeal from a "corrected judgment" entered by the court subsequent to the original judgment of conviction.

Compare *Corey* v. *United States*, United States Supreme Court Advance Opinions, No. 31, October Term 1963, 32 U. S. Law Week 4038 (December 9, 1963), wherein the defendant's right of appeal from the sentence ultimately imposed upon him was upheld by the majority, although this Court held that the defendant earlier acquired a right of appeal when subjected to the discipline of a commitment by the trial judge for observation and study pursuant to Title 18 U. S. Code § 4208(b).

It is submitted that having made timely appeal from a judgment imposed by the trial Court on June 10, 1963, with the trial Court having recognized and anticipated such appeal upon hearing and granting the motion therefor (R., pp. 84-85; Fols. 645-647), that such appeal should not have been dismissed but rather should have been considered on the merits as an appeal from the conviction herein.

POINT IV

Petitioner's right of appeal should be upheld to permit review of asserted errors of constitutional gravity regarding admissibility and use of contraband evidence seized upon a search without warrant, and an involuntary statement elicited as a direct result thereof.

Regardless of any technical defect in the perfection of petitioner's successive appeals, he should be accorded the right to prosecute an appeal with respect to errors of such gravity as infringed petitioner's fundamental Constitutional rights. Petitioner is seeking to protect his right to appeal to obtain a review of errors of such degree. It is submitted that notwithstanding any minimal technical defects, an appeal should be considered on its merits to the extent that it involves infringement of Constitutional rights.

Petitioner contends that his Constitutional rights were infringed by the trial Court's rulings denying his motion to suppress contraband items seized without warrant at petitioner's place of business, and by the admission into evidence of an involuntary statement extracted from him directly following the said search and seizure (R., pp. 9, 11-12, 13, 34; see also p. 46, Fols. 36, 41, 43, 140-141; Fols. 459-460).

Petitioner had moved on the eve of trial to suppress certain stolen securities, counterfeit $10 Federal Reserve Notes, and other contraband seized by federal agents during a search of petitioner's place of business, conducted without a warrant (Original record, pp. 651-659). Petitioner urged that such search and seizure and the prospective use of the fruits thereof violated his rights under the Fourth and Fifth Amendments (*ibid.*). The motion was referred to the trial, and was renewed at the trial (R. pp. 1, 48; Fols. 9-10, 463-464). The trial Court permitted the evidence to go to the jury, and reserved decision on the motion, granting

petitioner's attorney the opportunity to serve additional papers, after trial, in support of the motion (R., pp. 48, 53-55; Fols. 463-464, 597-599).

On April 22, 1963, the trial Court issued a memorandum opinion which denied petitioner's motion to suppress evidence, and denied all reserved trial motions (R., pp. 56-57). The memorandum notes that the Government had argued, *inter alia*, "that the search was lawful because it was incident to the consent of the prime lessee of the premises" where petitioner "operated his car-leasing business from desk space which he rented from Mr. Okun" (the prime lessee). In denying the motion, the Court held "that the search and seizure complained of was made pursuant to the consent freely given by Louis Okun, and was therefore lawful" (*ibid.*).

It is manifest that the denial of petitioner's motion to suppress on such ground directly contravened the decisions of this Court in *Jones* v. *United States*, 362 U. S. 257, 263-267 (1960) and in *Chapman* v. *United States*, 365 U. S. 610, 613-618 (1961). In the *Jones* case, this Court held that a defendant had standing to move to suppress evidence claimed to have been obtained illegally in violation of Constitutional rights, regardless whether the movant claimed or conceded any property right in the contraband or any substantial property right in the premises searched. The *Chapman* case holds that consent for a search given by a landlord does not serve to foreclose the Constitutional rights of the person against whom the search is being directed or against whom the evidence has been or is to be offered. The significance of these two decisions is indicated in a statement of this Court in *Ker* v. *California*, 374 U. S. 23, 34 (1963), to the effect that States may develop workable rules governing searches and seizures, "provided that those rules do not violate the Constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible

against one who has standing to complain" (374 U. S. at p. 34). The trend of increasing protection of the individual's right to be secure against unreasonable searches and seizures is indicated by such Courts of Appeals cases as *United States* v. *Blok*, 188 F. 2d 1019 (D. C. Cir. 1951), *Foster* v. *United States*, 281 F. 2d 310 (8th Cir. 1960), and *Villano* v. *United States*, 310 F. 2d 680 (10th Cir. 1962). It is now clear that the purported consent to the federal agents' search by Louis Okun, petitioner's landlord, was ineffective to preclude the petitioner from asserting his Constitutional objections to the search. Petitioner had standing to assert his objection to the search, and having made such objection by his motion to suppress, renewed during and after the trial, was entitled to a decision and order that would not preclude his rights by reason of any consent by his landlord.

The cases cited by the trial Court in its memorandum denying the petitioner's motion to suppress (R., p. 57) are not consistent with the rulings cited herein, and furthermore, involve claims for protection by persons whose contacts with the premises in question were marginal.

The immateriality of the landlord's purported consent is demonstrated by the federal agents' patent objective of searching petitioner's property and effects. When the landlord, Louis Okun, inquired as to the reason for the agents' presence, they replied that petitioner was in trouble (R., p. 1; fol. 60). The agents were aware that certain boxes they were searching contained petitioner's papers and records, prior to their discovery of any contraband therein (R., pp. 4-5, 9, 21, 39; Fols. 27, 28-30, 35-36, 69-70, 166). The landlord also understood this; at one point, he testified that he told the agents that they could "go right ahead, as long as you don't disturb my records" (R., p. 45; fol. 430; see also R., p. 44).

Petitioner submits that the denial of his motion to suppress evidence which the agents searched for and seized

without warrant, and without petitioner's consent, was an infringement of his Constitutional rights, as was the admission of such evidence upon the trial.

Petitioner claims that his Constitutional rights under the Fourth and Fifth Amendments were infringed by the admission into evidence of a statement, Exhibit 9 (R., pp. 45-48, 49-50), which was elicited as the direct result and fruit of the federal agents' said alleged illegal search for and seizure of contraband. This statement was prepared by the agents while they questioned the Petitioner at their headquarters. Petitioner testified at the trial that he told the agents that he would not approve any statement prepared by them until he had consulted an attorney (R., pp. 9-13; Fols. 36-44).

It is manifest, that to the extent that the statement was elicited from petitioner as the direct result of the unauthorized and illegal search and seizure, that the petitioner had a concomitant right to have the statement (Exhibit 9) excluded from evidence as one variety of fruit of the poisonous tree of the illegal search and seizure. *Wong Sun* v. *United States*, 371 U. S. 471, 486 (1963). See *Worthington* v. *United States*, 166 F. 2d 557, 566 (7th Cir. 1948); *Takahashi* v. *United States*, 143 F. 2d 118 (9th Cir. 1944).

Closely related to the exclusionary rule concerning statements resulting from illegal searches and seizures is the rule excluding all admissions against interest made under coercive or inquisitorial conditions. See *Bram* v. *United States*, 168 U. S. 532, 544 (1886).

In this case, the petitioner tried to avoid being held to the content of any written statement. He explicitly advised the agents that he wanted to consult a lawyer before approving any statement written by them. Had the agents limited their use of the purported statement to refresh their recollections of what the petitioner allegedly said to them, the statement would not have been independent evi-

dence of the truth of its content. The repeated proffering of such purported statement to the petitioner, which appears in the entire thread of testimony offered, placed an element of coercion regarding the statement which, it is submitted, made it inadmissible as contravening the safeguards of the Fifth Amendment. To be sure, the jury were properly instructed to determine whether it was a voluntary statement, and that they should disregard it entirely if they found that it was involuntary (R., pp. 50-53; Fols. 556-561). Furthermore, the jury did specially find that the statement was an involuntary one (R., p. 53; Fol. 570). It is submitted that the breadth and scope of Exhibit 9 could not avoid having some influence upon the jury notwithstanding the trial court's cautionary instructions.

The evidence of the government agents clearly indicates that Petitioner did not intend to adopt the statement as his own prior to consulting an attorney (R., pp. 9-13, 34; Fol., pp. 34-37, 38-41, 140-141). Consequently, it is submitted that such statement should have been excluded as an involuntary confession violating petitioner's Constitutional rights under the Fifth Amendment. Otherwise, the fact that a defendant expresses a desire not to sign a statement and that he declines to take a positive step by which the statement could be attributed to him, would be of little avail.

CONCLUSION

Petitioner contends that one of the orders of the Court of Appeals for the Second Circuit, entered herein on May 29, 1963 and June 26, 1963, respectively dismissing the appeals filed by petitioner on May 6, 1963 and on June 11, 1963, was in error for the reasons set forth hereinabove; and that the same should be reversed and remanded to said Court of Appeals with instructions to reinstate such appeal for consideration on the merits.

Respectfully submitted,

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APPENDIX

Statutes Involved

1. U. S. Constitution, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. U. S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Criminal Appeals Rules Act, Act of February 24, 1933, c. 119, 47 Stat. 904, Section 2. as amended:

Sec. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

Federal Rules of Criminal Procedure:

4. Rule 37(a)(2):

(2) TIME FOR TAKING APPEAL. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

9. Rule 45(a):

(a) COMPUTATION. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

10. Rule 56:

The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a

deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

7. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 206-a:

1. Notwithstanding the provisions of any general or special law, holidays and Saturdays shall be considered as Sunday for all purposes relating to the transaction of business in county offices in every count of the state, except in a county wholly contained within a city. On all other days, except Sundays, such offices shall be kept open for the transaction of business. For the purposes of this section, the term "county offices" shall mean all offices, the officers or employees of which are paid in whole or in part from county funds.

2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

3. Notwithstanding the foregoing provisions of this section, the motor vehicle section of a county clerk's office may, by resolution of the board of supervisors, be kept open on Saturdays during the month of January.

8. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 902:

1. The offices of the county clerk in the counties constituting the city of New York shall remain open for the transaction of business from nine o'clock in the forenoon to four o'clock in the afternoon every day except Saturdays, Sundays and holidays and except in the months of July and August when said offices shall remain open for the transaction of business from nine o'clock in the forenoon to two

o'clock in the afternoon except Saturdays, Sundays and holidays.

2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

3. Notwithstanding the foregoing provisions of this section, the motor vehicle section of a county clerk's office may, by resolution of the board of estimate, be kept open on Saturdays during the month of January.

9. McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Section 282:

1. The offices of clerks of courts of record in the counties of New York, Kings, Queens, Richmond and Bronx shall remain open for the transaction of business from nine o'clock in the forenoon to four o'clock in the afternoon every day except Saturdays, Sundays and holidays and except in the months of July and August when said offices shall remain open for the transaction of business from nine o'clock in the forenoon to two o'clock in the afternoon except Saturdays, Sundays and holidays.

2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

10. McKinney's Consolidated Laws of New York, Book 46, Public Officers' Law, Sec. 62:

1. Holidays and half holidays shall be considered as Sunday for all purposes relating to the transaction of business in the public offices of each county. On all other days and half days, excepting Sundays, such offices shall be kept

open for the transaction of business. This subdivision is subject to the provisions of section two hundred six-a of the county law and sections 1032-14.0 and 1052-22.0 of the administrative code of the city of New York.

2. Holidays and Saturdays shall be considered as Sunday for all purposes relating to the transaction of business in the public offices of the state. On all other days, excepting Sundays, such offices shall be kept open for the transaction of business. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on a Saturday, the ti[illegible] therefor is hereby extended to and including the next b[illegible]siness day.